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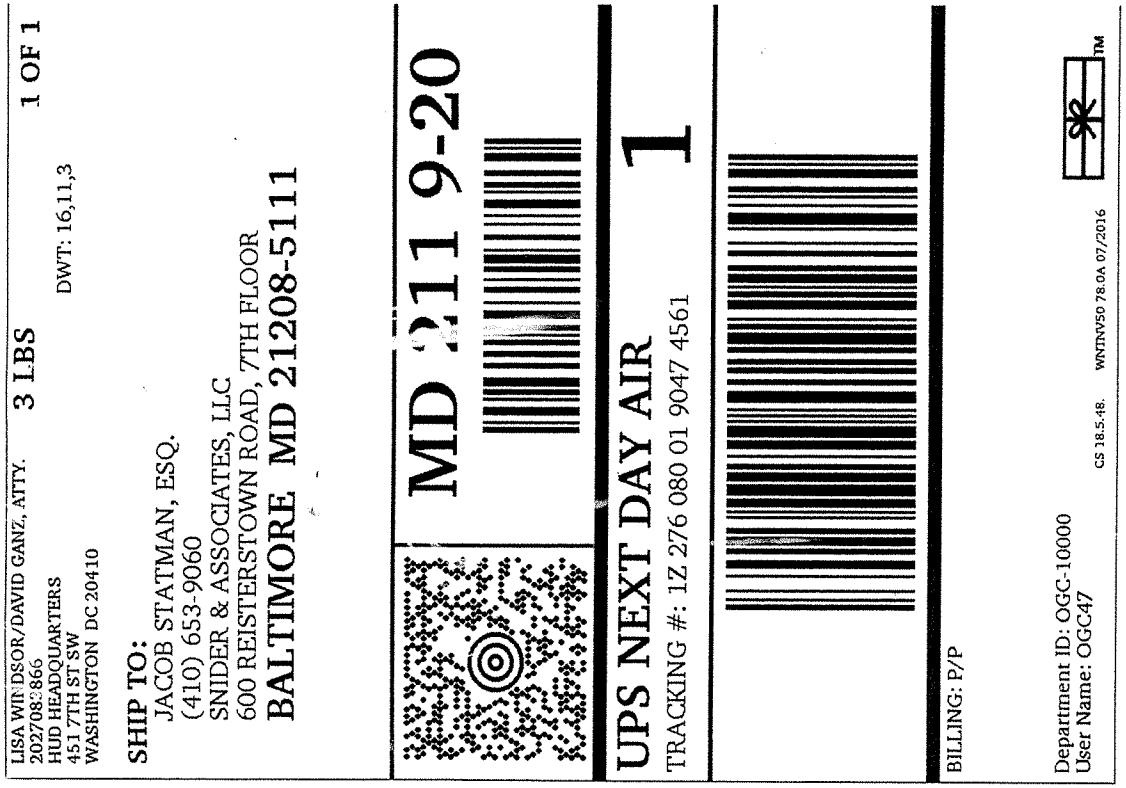

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FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 20424-0001

National Council of HUD Locals 222, AFGE, AFL-CIO Union,	)	
v.	)	Case No.: O-AR-4586
U.S. Department of Housing and Urban Development, Agency.	)	September 29, 2016

TABLE OF CONTENTS

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National Council of HUD Locals 222, AFGE, AFL-CIO Union,	)	
v.	)	Case No.: O-AR-4586
U.S. Department of Housing and Urban Development, Agency.	)	September 29, 2016

Agency Response to Order to Show Cause

Pursuant to the Federal Labor Relations Authority (FLRA or Authority), Office of Case Intake and Publication, September 15, 2016 Order to Show Cause, the Department of Housing and Urban Development (Agency or HUD) hereby timely files its Response.

As set forth fully below, the Agency's Exceptions to Implementation Meeting (IM) Summary Order 10 should not be dismissed as untimely because the DC Circuit Court's ruling in *Scobey*[1] is inapplicable to the FLRA's jurisdiction to hear an exception to an arbitration award and the reasons underlying *Scobey* do not apply to the present case; because FLRA and Federal precedent clearly establishes that the Agency's Exceptions to Summary Order 10 are timely under 5 C.F.R. 2425.2(b); because IM Summary Order 10 modified IM Summary 9 in such a way that gives rise to the current Exceptions, and; because the Agency's bias arguments relate to matters in Summary Order 10.

[1] *United States Dep't of Homeland Sec. v. Fed. Labor Rels. Auth.*, 784 F.3d 821 (D.C. Cir. 2015).

ARGUMENT

I. <u>The sovereign immunity and other contrary to law arguments contained in the Agency's current Exceptions do not fall within *Scobey's* finding that routine statutory questions are not transformed into constitutional or jurisdictional issues because a statute waives sovereign immunity because the *Scobey* case relates to a Federal Court's jurisdiction to hear appeals from the FLRA, not the FLRA's jurisdiction to hear appeals from an arbitrator's order or award.</u>

Scobey relates only to the Federal Court's jurisdiction to hear appeals from the FLRA under 7123(a) and has absolutely nothing to do with the FLRA's jurisdiction or authority to hear appeals of arbitration awards. *See United States Dep't of Homeland Sec,*784 F.3d 821. FLRA case law has not applied *Scobey* to preclude arguments of sovereign immunity before the Authority and FLRA precedent clearly establishes that sovereign immunity is a matter of "jurisdiction and may properly be raised at any time." *SSA Office of Disability Adjudication v. AFGE Local 1164*, 65 FLRA 334 (2010); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005); *Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995). Regardless of the DC Circuit's holding in *Scobey*, the Supreme Court has stated, "it is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Likewise, "It long has been established, of course, that the United States, as sovereign, is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399 (U.S. 1976) *citing* to *United States v. Sherwood,* 312 U.S. 584, 586 (1941). *See also Brown v. Sec'y of Army*, 316 U.S. App. D.C. 284, 78 F.3d 645, 648 (D.C. Cir. 1996) ("The Commission's assertion of sovereign immunity, however, goes to this court's jurisdiction and may properly be raised at any time.")

Regardless of the FLRA's interpretation of *Scobey* as precedent in light of the Supreme Court's ruling in *Testan*, supra., although the court in *Scobey,* states that "[r]outine statutory and regulatory questions... are not transformed into constitutional or jurisdictional issues..."[2] the jurisdiction at issue in that case was the DC Circuit's ability under § 7123(a) to hear an agency's appeal of an arbitration award confirmed by the FLRA. As shown above, this has absolutely no bearing on the FLRA's jurisdiction to consider the Agency's Exceptions, which, under FLRA case law, it can bring at any time.

II. To the extent *Scobey* applies to the FLRA's determination of whether to consider the Agency's arguments in its Exceptions to Summary 10, under *Scobey* the FLRA must consider these arguments as the case does not involve "routine statutory and regulatory questions."

As discussed above, *Scobey* has no relevance to the FLRA's jurisdiction or ability to consider the Agency's current Exceptions, however, to the extent it does, unlike the single employee and single night of overtime pay in *Scobey* that led the Court to find that the case consisted of routine statutory and regulatory questions, the Fair and Equitable case presents the complete opposite. The current case is not routine because classified GS-13 positions do not exist to promote the thousands of award recipients in violation of sections 5 C.F.R. related to position classification; the orders would result in 73% of the GS-12 employees within the Agency being promoted to GS-13,[3] which would impact the Agency's ability to assign grade appropriate work; the Agency does not have funding[4] to pay approximately $700M in damages[5](this amount is subject to increase as it represents the retroactive promotion of 3,777

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[2] *See United States Dep't of Homeland Sec.,* 784 F.3d at 823.
[3] *See* Ex. 1, as part of HUD's publically available FY 2016 Budget Justifications, it has 8,935 employees in total and its Salary and Expense appropriation is $1.42 billion.
[4] *See* Ex. 2, FY 2017 publically available Budget Justifications.
[5] *See* Ex. 3, Union's cost estimate to implement the award totaling $720 million provided to the Agency in December 2014.

employees effective 2002, however, in Summary Order 6, the Arbitrator noted that she was still determining if the effective date should be as early as July 1999 and in Summary 10 the Arbitrator ordered increased damages based on overtime payments made to award recipients)[6], which is approximately half of its current year salary and expense appropriation[7] and would require massive furloughs of the Agency in the absence of a Congressional appropriation funding the case; nor does it have the ability to obtain this appropriation without the consent of the Office of Management and Budget and Congress.

Likewise, the January 2012 Remedial Award has been continually modified by the Arbitrator with her IM Summary Orders 1-10, including IM Summary 6, p. 3, which states the effective date could be made earlier in 1999, which would result in tens of millions of dollars in additional damages. All of these factors clearly distinguishes this case from *Scobey,* which involved a "night's worth of overtime pay" for one employee and didn't involve issues of the Appropriations Clause, the Anti-Deficiency Act, potential Agency-wide furloughs, or a Back Pay Act award in the amount of $700 million based on a sanction and adverse inference[8], which cannot under FLRA and Federal case law support an award under the Back Pay Act. *See* Merits Award, pp. 12-13. Rather, as the Agency clearly establishes in Exceptions to Summary 10, this case raises serious and precedential issues related to sovereign immunity and the Appropriations Clause that warrant the FLRA's attention and should not be dismissed on a technical and improper reading of § 2425.2 or a Federal Court case that has no bearing on the FLRA's current

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[6] *See* Ex.s A6, p. 3, and A10, respectively.

[7] *See* Ex. 1.

[8] The practical result of an award amounting to $700 million in retroactive backpay is thousands of employees who were not harmed receiving over $100,000 each as the result of the Merit Award's adverse inference that resulted in the Agency not being able to use **any** data or HR records to limit the size of the class of award recipients. *See* Ex. 4, Merit Award and Ex. A6, Summary Order 6. This adverse inference was drawn by the Arbitrator because the Agency's Employee Labor Relations branch who was representing the Agency at the arbitration hearing was unable to produce documents dating back to 2002 requested by the Union during an arbitration until 2008 at the cost of Agency wide furloughs and the ability to operate its programs. *See* Ex. 4, Merits Award.

determination. Furthermore, *Scobey,* notes that "[w]e thus do not need to decide whether any alternative avenues of review might exist in the event the Authority egregiously misinterprets the Act. *See United States Dep't of Homeland Sec.* at 824. Here, such egregious misinterpretation of the Back Pay Act has occurred by the Arbitrator and the Authority's failure to rule on that issue by applying a Federal Court case applying 5 U.S.C. 7123 that has no relevance to the Authority's scope of review or jurisdiction only furthers the Arbitrator's egregious violation of the Back Pay Act, Appropriations Clause, and the doctrine of sovereign immunity.

III. Federal Court and FLRA precedent provides that a party can raise a sovereign immunity argument at any time and does not limit this holding to 5 C.F.R. §§ 2425.4 or 2429.5; nor is 2425.2(b) a bar to the Agency's sovereign immunity arguments in its Exceptions to Summary Order 10.

Under § 2425.2(b) of the Authority's Regulations, a 30-day time limit for filing exceptions begins to run when the arbitrator serves a final award on the parties. However, sovereign immunity is a matter of "jurisdiction and may properly be raised at any time." *SSA Office of Disability Adjudication v. AFGE Local 1164*, 65 FLRA 334 (2010); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005); *Department of the Army v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995). These cases are not limited to arguments in Exceptions to the Authority that may be precluded pursuant to 5 C.F.R. §§ 2425.4 or 2429.5 and the Show Cause Order cites to no legal authority indicating that the above cases' holding that a sovereign immunity argument can be raised at any time somehow does not apply to cases where timeliness under 5 C.F.R. § 2425.2 is raised as an issue by the Authority or an opposing party.

Every Summary Order, including Summary 10, states that the purpose of the Order is to implement "the Award," which includes the Remedial Award and Summary Orders, by awarding retroactive promotions and backpay, which the Agency contends violates the Back

Pay Act. *See* Ex. A10, Summary Order 10, p. 5. Consequently, Summary Order 10's express purpose is, among others, to award retroactive backpay and therefore it gives rise to a sovereign immunity argument, which under the above cited case law can be properly raised at any time, because Summary Order 10's expressly stated purpose is to implement the Remedial Award. *See SSA Office of Disability Adjudication*, 65 FLRA 334; *Settles*, 429 F.3d 1098; *Department of the Army*, 56 F.3d 273. Thus, the Authority should not dismiss the Agency's contrary-to-law arguments, including those related to sovereign immunity, as untimely.

In addition to the above cases which are directly on point, Federal Court and FLRA precedent in similar Title 5 cases establishes that the Agency's current Exceptions cannot be barred based on timeliness under § 2425.2(b). In *Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison v. FLRA,* 56 F.3d 273, 275 (D.C. Cir. 1995), which was a case in which the Authority sought to enforce an unfair labor practice (ULP) against an agency, the Court stated:

> "The Authority also argues that the Army waived its right to present a sovereign immunity argument to this court by failing to raise it first before the agency. There, the Army made the general argument that the proposed remedy is not authorized by the Statute, but it did not raise the more specific sovereign immunity claim. Although the Statute does provide that except in "extraordinary circumstances" the reviewing court is not to consider an argument that was not raised before the FLRA, 5 U.S.C. § 7123(c), this provision cannot bar a belated claim of sovereign immunity."

Furthermore, in *United States Dep't of the Treasury IRS*, 61 F.L.R.A. 146, 151 (F.L.R.A. 2005)[9], the Authority itself stated that "as a general rule, an agency cannot collaterally attack an arbitration award during the processing of a ULP complaint alleging an unlawful failure to comply with that award." The Authority then went on to find that "[h]owever, a claim of

[9] *Citing* to *United States Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 15 FLRA 151, 153-54 (1984), aff'd sub nom., *Department of the Air Force v. FLRA*, 775 F.2d 727, 734-35 (6th Cir. 1985).

federal sovereign immunity can be raised by an agency at any time." *See United States Dep't of the Treasury IRS*, 61 F.L.R.A. at 151 *citing* to *Department of the Army v. FLRA*, 56 F.3d 273, 275, 312 U.S. App. D.C. 309 (D.C. Cir. 1995). These cases show that an agency's argument concerning sovereign immunity can be brought at any time and that this precedent has been applied by the Authority in a variety of cases and both at the exception stage when an argument is not first presented to an arbitrator and at the ULP stage when it was not previously raised with the Authority. The same rationale for allowing a sovereign immunity argument in these cases apply presently; namely that the United States, as sovereign, is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[10]

As noted above, the Show Cause Order cites to no legal authority indicating that the above precedent that a sovereign immunity argument is a matter of jurisdiction and can be raised at any time does not apply to cases where timeliness under 5 C.F.R. § 2425.2 is somehow at issue or that this precedent is limited to cases where arguments in exceptions to the Authority may be precluded pursuant to 5 C.F.R. §§ 2425.4 or 2429.5. Likewise, the Agency has been unable to find any FLRA precedent showing that a party's sovereign immunity exceptions, which could otherwise be brought at any time, were dismissed in a per se manner pursuant to 5 CFR 2425.2(b) because they were not raised within 30 days of a final award.

Here, the Agency's Exceptions were filed within 30 days of a final order (Summary Order 10) and are timely. Given that the scope of the damages is approximately $700 million, that the Agency cannot unilaterally obtain an appropriation for this amount, and the Agency could have

[10] *Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995) *citing* to *United States v. Sherwood*, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941).

to furlough its employees for approximately half a year to pay $700 million in damages[11], there is no legally permissible or sound public policy reason to improperly and narrowly restrict the above cited Federal and FLRA case law to only 5 CFR 2425.4 and 2429.5. The same public policy reasons, such as safeguarding the public purse and allowing the Agency to operate for its mandated purpose of insuring loans and funding local public housing authorities, that underlie the above cases' holding that sovereign immunity arguments can be raised at any time apply to the present case. Thus, the Agency's current timely Exceptions must be considered by the Authority. *See SSA Office of Disability Adjudication*, supra; *Settles*, supra; *Department of the Army*, supra; *Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison,* 56 F.3d at 275; *United States Dep't of the Treasury IRS*, 61 F.L.R.A. at 146.

Finally, the Agency's sovereign immunity arguments in its current Exceptions should be deemed timely and considered by the Authority because "officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision of Congress." *Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison,* 56 F.3d at 275 *citing* to *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660, (1947). If the FLRA does not even consider that the Agency's sovereign immunity arguments contained in its Exceptions to Summary 10 based on timeliness, the resulting effect is that the FLRA as a Federal administrative body has waived the government's immunity to suit. This would result in the Authority violating the Supreme Court's prohibition in *N.Y. Rayon Importing Co.*, supra., if the Authority does not rule on the question of whether the Arbitrator's Remedial Award and Summary Orders are a proper waiver of sovereign immunity under the Back Pay Act.

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[11] *See* Ex. 1, FY 2016 Salary and Expensive budget, showing that in total the Agency received $1.42 billion for Salaries and Expenses.

IV. In the alternative, if it is determined that notwithstanding the above FLRA and Federal Court precedent, 5 C.F.R. 2425.2 bars the Agency's Exceptions based on timeliness, then because of the modification contained in Summary 10, the Agency can now bring them.

1. The Show Cause Order implying that the Agency should have brought its sovereign immunity arguments earlier is without merit.

At the outset, the Agency notes that the Authority has never found that the Remedial Award was modified[12], but that the Show Cause Order, p. 4, relies on some earlier modification (perhaps Summary Order 2, 3, or 6) for the proposition that "it does not appear that the tenth summary modifies the remedial award in a way that gives rise to the majority of the deficiencies alleged in the Agency's exceptions." Although the preceding statement does not expressly state that the Authority believes that the Agency should have brought its sovereign immunity arguments in response to an earlier Summary Order, such a statement is implied given that the Remedial Award is silent as to the Back Pay Act and to the order to promote thousands of employees as ordered by Summary Orders 3 and 6. *See* Ex. 5, Remedial Award. However, the Authority has never found in response to Agency's numerous Exceptions and Motions for Reconsideration in this case that the Summary Orders or GS-1101 or PHRS/CIRS Orders modified the Remedial Award. Summary Order 3 ordered the promotion of over 1900 employees, however the Authority found that Summary Order 2 contained this same order and did not consider the Agency's argument.[13] Thereafter Summary Order 6, ordered the retroactive promotion of 3,777 employees. *See* Ex A6, Summary Order 6. Again the FLRA found that

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[12] *See* FLRA decisions denying Agency's Exceptions: *United States HUD*, 68 F.L.R.A. 631 [*16] (F.L.R.A. 2015) (denying Exceptions to Summary 3 based on a finding of no modification); *United States HUD,* 69 F.L.R.A. 60, 64 (F.L.R.A. 2015) (denying Motion for Reconsideration based on a finding no modification); *United States Dep't of HUD*, 69 F.L.R.A. 213, 222-223 (F.L.R.A. 2016) (finding no modification and denying Agency's Exceptions to Summary 6). ***See also***, Dissents of Member Pizzella in above cited cases.

[13] *United States HUD*, 68 F.L.R.A. at [*16].

Summary 6 did not contain any modifications and denied the Agency's Exceptions. *See United States Dep't of HUD*, 69 F.L.R.A. 213.

Therefore, the Agency could not have hypothetically brought Exceptions to Summary Orders 3 or 6 containing a sovereign immunity argument as the Authority found that these Summary Orders did not modify the previous Summary Orders or Remedial Award. For the Authority to find that the Agency's sovereign immunity and other arguments in its Exceptions to Summary 10 are not timely on the basis the they should have been brought in response to an earlier Summary Order or the Remedial Award is arbitrary and capricious and a violation of the Administrative Procedures Act (APA), 5 U.S.C. § 706, because it requires the Agency to have filed an Exception to a Summary Order that contained no modification (as found by the Authority) or the Remedial Award, which made no mention of the Back Pay Act or indicated that the award recipients would be based on a sanction that resulted in 3,777 employees being retroactively promoted.[14]

2. Summary Order 10 modified the Remedial Award and prior Summary Orders, including Summary Order 9 by ordering a formal hearing with testimony from Agency officials and additional damages based on overtime payments.

The Show Cause Order, p. 4, equating the possibility of a formal hearing in Summary Order 9 and the direction in Summary Order 10 that a formal hearing will occur is incorrect and a clear violation of the arbitrary and capricious standard in the APA, 5 U.S.C. § 706. IM Summary 9, stated only that the Arbitrator agreed to "a conduct formal hearing on the record, with testimony, if necessary." IM Summary 9, p. 4. (Emphasis added.) Summary 10 ordered

[14] To the extent that the Agency believed employees were harmed by its violations of the collective bargaining agreement (CBA), it retroactively promoted 17 employees with backpay pursuant to the Remedial Award at a cost of more than $1.7 million dollars. *See* Ex. 6, SF-50s of promoted employees. Thus, it has complied with the Remedial Award.

the Agency to produce witnesses to give testimony in the effort to implement the award. *See* IM Summary 10, p. 5. The possibility of an outcome and the actual outcome being ordered are not the same or equivalent events. For example, in a criminal trial a judge states that if the defendant does not show why a piece of physical evidence is unreliable, then he will admit it into evidence, and the order admitting the evidence are not the same or equivalent occurrences, but rather are quite different. Likewise, the Show Cause Order stating that Arbitrator McKissick stated her "willingness" in Summary 9 to conduct a formal hearing "if necessary" is not the same as the order that a formal hearing will be held. Nor did any other Summary Order or the Merit or Remedial Awards state that a formal hearing would be held. *See* Exs. A1-A10, Summary Order 1-10. Thus, it is indisputable that the current IM Summary 10 has modified the January 12, 2012 Remedial Award and subsequent Summary Orders 1-9 by including a requirement or order that formal evidentiary hearing will be conducted with testimony from Agency officials for the purpose of implementing the Remedial Award and Summary Orders.

Additionally, in Summary Order 10 the Arbitrator has ordered the Agency to produce overtime payments to class members for the purpose of ascertaining damages pursuant to the Fair Labor Standards Act by June 1, 2016. *See* Ex. A10, Summary Order 10, p. 4. Summary Order 9 made no mention of overtime payments to class members; nor did it or any other Summary Order or the Remedial Award establish that the Agency had failed to produce information related to overtime payments by a certain date (June 1, 2016). *See* Ex. A1-A9, Ex. 5, Remedial Award. Given that the overtime payment information order from the Arbitrator that the Agency failed to comply with in Summary 10 is clearly related to increasing the amount of damages owed to the Union in violation of the Back Pay Act and was not contained in a previous

Summary Order, the Agency's arguments related to sovereign immunity in its current Exceptions are timely.

An arbitrator may clarify an ambiguous award, but the clarification must conform to the arbitrator's original findings. See, *SSA, Region 1, Boston, Mass.*, 59 F.L.R.A. 614, 616, (2004) *citing* to *U.S. Dep't of the Army, Army Info. Sys. Command*, 38 FLRA 1464, 1467 (1991). Here the Arbitrator modified the terms of the original award without the joint consent of both parties and because the original award made no mention of subsequent "formal hearings." *See* Ex. 7, Agency's comments on proposed Summary 10 (showing that the Agency objected to and thus did not consent to having a formal hearing). Thus, it is not possible that Summary 10's order for Agency officials to participate in a formal hearing by giving testimony under oath or damages based on overtime payments is a clarification, but rather is plainly an additional requirement that modifies the original award in an effort to implement the Remedial Award and Summary Orders ordering retroactive back pay in violation of the Back Pay Act and the doctrine of sovereign immunity.

3. Even if FLRA case law restricts the subject of an exception to a modification to what was modified, such precedent should not apply to the current case to exclude the Authority's consideration of the Agency's Exceptions on the basis of timeliness.

Given the above established modifications, the Agency now will address the Show Cause Order's statement that an exception to a modification of an otherwise final award can only properly relate to the deficiencies alleged to result from the modification and that therefore the Agency's current Exception's arguments related to sovereign immunity are untimely. The Show Cause Order cites to *United States Dep't of the Navy Mare Island Naval Shipyard*, 52 F.L.R.A. 1471 (F.L.R.A. 1997) for the preceding proposition. *See* Show Cause Order, p. 3. However, this

case is easily distinguishable and should not be considered controlling precedent because it contained only two distinct awards; the original relating to a finding that reduction in force (RIF) regulations were violated and ordering the employee reinstated with backpay and the supplemental relating to the amount of backpay. *See Dep't of the Navy Mare Island Naval Shipyard,* 52 F.L.R.A at 1472-1473. The Authority found that the agency's argument in its Exceptions to the supplemental award were challenging the arbitrator's determination of liability based on application of the RIF regulations and damages in the original award and dismissed the Exceptions as untimely. *Id.* at 1475.

The present case involves a Remedial Award and 10 Summary Orders. Unlike, the agency in *Navy Mare Island*, supra., the Agency's arguments related to sovereign immunity are not challenging Arbitrator McKissick's determination that the Agency is liable for violating the CBA or the class of award recipients who are to receive prospective promotions, but rather that her entire remedy related to backpay as it relates to thousands of employees (contained in the Summary Orders) is unlawful. The express purpose according to Arbitrator McKissick for the formal hearing ordered by Summary Order 10 is to implement the unlawful award[15] of backpay and Summary 10 seeks to increase the amount of backpay owed based on overtime payments to award recipients. *See* Ex. A10, Summary Order 10, p. 4. Thus it clear that unlike the supplemental award in *Navy Mare Island*, supra., ordering a specific amount of damages based on the earlier original award finding liability for a single employee, Summary Order 10 is an independent order directing the Agency to take actions to implement and expand the award of backpay as part of a series of Summary Orders that have continually modified and expanded the 2012 Remedial Award. Consequently, because the Agency's current Exceptions related to

[15] *See* Summary 10, p. 5.

sovereign immunity contest the nature and lawfulness of the awarded remedy, they should be considered by the Authority.

Similarly, Implementation Summary 10, p. 5, notes that Arbitrator McKissick's "jurisdiction extends to all outstanding items in this matter." The "outstanding items" in this matter include the orders in Summary Orders 3 and 6 and the GS-1101 PHRS/CIRS Order to promote 3,777 employees with backpay and TSP/annuity adjustments pursuant to the Back Pay Act, which, as are shown in the Exceptions to Summary 10, are contrary to law, violates the government's immunity from money damages because it exceeds the scope of the government's waiver of sovereign immunity in the Back Pay Act, and violates the Appropriations Clause of the Constitution. Therefore, given the Arbitrator claim of continuing jurisdiction to implement or effectuate her unlawful award and orders and the express purpose of the formal hearing order in Summary 10, the Agency can properly bring an exception to it in under 5 U.S.C. § 7122(a) and 5 C.F.R. §§ 2425.2, 2425.6 and *Navy Mare Island*, supra., is inapplicable.[16] Additionally, given that Exception 10 reasserted jurisdiction over implementing the award, the Agency can raise its sovereign immunity arguments at any time because, as was noted above and in the Exceptions to Summary 10, sovereign immunity relates to jurisdiction and therefore the current Exceptions are timely. *See SSA Office of Disability Adjudication*, 65 FLRA 334 (sovereign immunity is a matter of jurisdiction and may properly be raised at any time); *Settles*, 429 F.3d 1098; *Department of the Army*, 56 F.3d 273.

[16] To address the hypothetical situation that a government agency could bring a sovereign immunity argument related to the Back Pay Act years after an arbitration case ended, this is not the case presently as the Remedial Award has been continually modified by the Arbitrator and the class of award recipients has increased from 6 witnesses at the 2008 arbitration hearing to an order to promote 3,777 employees retroactively with backpay. *See* Ex. 4, Merit Award and Ex. A6, Summary Order 6.

V. Because the Arbitrator did not retain jurisdiction in the Remedial Award and the Agency objected to the Implementation Meeting process, she lacked jurisdiction to issue Summaries 1-10 and therefore the Agency's sovereign immunity arguments in its current Exceptions are not barred by § 2425.2.

In the January 2012 Remedial Award the Arbitrator did not retain implementation jurisdiction in the Remedial Award. *See Remedial Award.* Thereafter, the Agency's "refusal to participate" as noted in the January 4, 2014, email from the Arbitrator[17], in the implementation meetings, clearly establishes that it did not consent to the Arbitrator's continued jurisdiction or authority. *See Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 F.L.R.A. 410, 415 (1988) *citing* to United *Mine Workers of America, District 28 v. Island Creek Coal Company*, 630 F. Supp. 1278 (W.D. Va. 1986) (noting that in the absence of a joint request by the parties, the Arbitrator fulfilled the function of his office and was *functus officio*). (Emphasis added.) It was not until the first IM Summary Order in March 2014 that the Arbitrator attempted to improperly assert jurisdiction for implementation of the January 2012 Remedial Award. *See* Ex. A1, IM Summary 1, p. 4. Thus, it is clear that the Arbitrator did not retain jurisdiction in the January 2012 Remedial Award and that the Agency did not consent to her continued jurisdiction thereafter.

The Authority has consistently held that, unless an arbitrator retains jurisdiction after issuance of an award, the arbitrator is without legal authority to take any further action with respect to that award without the joint request of the parties. *See U.S. DOD Dependents Sch.*, 49 F.L.R.A. 120, 122, (1994) *citing* to *GSA and AFGE, Local 2600*, 34 FLRA 1123 (1990). For example, in the matter of the *U.S. Dept. of the Navy v. AFGE, Local 1923,* 56 F.L.R.A. 848; 2000 FLRA LEXIS 162; 56 FLRA No. 141 (September 29, 2000), the FLRA held that an

[17] Ex. 8, January 2014 email from Arbitrator to Agency.

arbitrator may retain jurisdiction for the purpose of "overseeing the implementation of remedies." *U.S. Dept. of the Navy v. AFGE, Local 1923,* 56 F.L.R.A. at 852. In that case, the Arbitrator issued five remedial awards and a compliance award. The Authority held that an arbitrator may retain jurisdiction for purposes of overseeing implementation; therefore, the arbitrator had jurisdiction to issue the compliance award regarding three of the awards in that case. *Id.* at 852. The Authority based its holding on its finding that there was no dispute that, in three of the awards, the Arbitrator specifically retained jurisdiction to resolve compliance issues. *Id.* Otherwise, the Authority explained that without a retention of jurisdiction, an arbitrator becomes *functus officio* and may not exercise jurisdiction over implementation of remedies. *Id.* In fact, the Authority has taken this position consistently over the years. *GSA and AFGE, Local 2600*, 34 FLRA No. 171 at [*253]; *Overseas Federation of Teachers AFT, AFL-CIO and Department of Defense Dependents Schools, Mediterranean Region*, 32 FLRA 410, 415 (1988); *Veterans Administration Hospital, San Antonio, Texas*, 15 FLRA 276, 277 (1984).

Given that the Arbitrator lacked jurisdiction to issue Summary Orders 1-10, the Agency's current Exceptions cannot be barred by 5 C.F.R. § 2425.2(b) because the purported Summary Orders were not binding as the Arbitrator lacked jurisdiction to issue them. Thus, the Agency did not have to bring its sovereign immunity argument within 30 days of Summary 2, 3, or 6 or the GS-1101 or PHRS/CIRS Orders. Consequently, 5 C.F.R. § 2425.2 is inapplicable, however, to the extent that the IM Summary Orders are in any way binding on the Agency, the Authority must consider the Agency's Exceptions, including its contrary-to-law sovereign immunity arguments for the reasons discussed above.

VI. The Agency's bias exceptions are timely because the alleged biased actions took place during Summary Meeting 10.

The Agency herein reincorporates by reference its Arguments made in its current July 29, 2016, Exceptions regarding bias. To establish that an arbitrator is biased, the moving party can demonstrate that there was partiality or corruption on the part of the arbitrator. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr.*, 57 FLRA 417 (2001). As established above, the modification in Summary Order 10 of requiring a formal hearing of Agency officials and increased damages based on overtime payments is beyond the jurisdiction of the Arbitrator and thus shows partiality and bias. The Agency did not consent to participate in formal hearings with testimony under oath at any time after the initial arbitration hearings in 2008. Additionally, Summary 10's order for Agency officials to provide testimony so as to effectuate the illegal award and Summary Orders edict to pay retroactive backpay that are in violation of the Back Pay Act and that are beyond the scope of the government's waiver of sovereign immunity in violation of the Anti-Deficiency Act, which is properly before the Authority, also shows partiality and bias.

CONCLUSION

Based on the foregoing, the Agency's Exceptions to Summary 10 are timely and should not be dismissed. The applicable legal precedent discussed above requires that the Agency's Exceptions to Summary 10 to be considered by the Authority and the Authority's apparent improper interpretation of its regulations, which would, yet again, preclude the necessary consideration of the merits of this case, will not benefit the Agency or the American people whom HUD serves.

Respectfully submitted,

/s/ David Ganz

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CERTIFICATE OF SERVICE

The Agency's Exceptions have been served on all parties on the date below, and via the method indicated:

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September 29, 2016 — */s/ David Ganz*

(Date) — DAVID GANZ

Agency Representative

Table of Exhibits

Ex. No. 1: FY 2016 Budget Justifications

Ex. No. 2: FY 2017 Budget Justifications

Ex. No. 3: Union's cost estimate to implement the award

Ex. No. 4: Merit Award

Ex. No. 5: Remedial Award

Ex. No. 6: SF-50s of promoted employees

Ex. No. 7: Agency comment on proposed Summary Order 10

Ex. No. 8: January 4, 2014, email from the Arbitrator to the Agency

Ex. A1-A10: Implementation Meeting Summary Orders 1-10